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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
MCI Telecommunications Corporation	)	CC Docket No. 96-149
	)	
Petition for Declaratory Ruling Regarding the Joint Marketing Restriction in Section 271(e)(1) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996	)	

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To: The Commission

BELLSOUTH REPLY COMMENTS

BellSouth Corporation ("BellSouth"), on behalf of its subsidiaries and affiliates, hereby replies to those comments submitted in response to the Petition for Declaratory Ruling filed by MCI Telecommunications Corporation ("MCI") in CC Docket 96-149 on May 1, 1997 (hereinafter "MCI Petition") regarding the joint marketing restriction in Section 271(e)(1) of the Communications Act, as amended. For the reasons previously stated and as discussed herein, BellSouth believes the Commission should deny the MCI Petition by finding the marketing materials submitted by MCI to be contrary to Section 271(e)(1)[1] and the Commission's *First Report and Order*[2] in this proceeding.

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1 47 U.S.C. § 271(e)(1).

2 *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 96-489 (rel. Dec. 24, 1996) ("*Non-Accounting Safeguards Order*"), *petitions for recon. pending.*

DISCUSSION

As a preliminary matter, BellSouth notes that the parties submitting comments in this proceeding were nearly unanimous in urging the Commission to deny MCI's Petition for Declaratory Ruling and find that the marketing materials submitted by MCI are contrary to Section 271(e)(1) and the Commission's *Non-Accounting Safeguards Order*.[3] Moreover, those parties opposed to the MCI marketing materials included Time Warner Communications Holdings, Inc. in addition to several of the Bell operating companies ("BOCs").[4] BellSouth supports Time Warner's conclusion that "[i]f the Commission were to allow MCI to use the marketing materials offered as exhibits to its petition, it would render the joint marketing restriction of Section 271(e)(1) meaningless."[5] Accordingly, the Commission should "make clear that it will not allow covered interexchange carriers ['IXCs'] to chip away at a rule that is already of limited duration and scope."[6] To find otherwise by endorsing some or all of the MCI marketing materials would allow MCI to "enjoy an unfair and potentially long-lasting competitive advantage that will ultimately harm consumers."[7]

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[3] *See* Ameritech Comments at 2; Bell Atlantic and NYNEX Opposition at 1, 4; BellSouth Comments at 1, 12; SBC Communications, Inc. Opposition at 1, 5-8; Time Warner Communications Holdings, Inc. Comments at 3, 7-8; U S West Comments at 5.

[4] According to Time Warner, the marketing materials submitted by MCI in Exhibits A, B and C violate the joint marketing restriction in Section 271(e)(1) by conveying the appearance of one-stop shopping. Time Warner Communications Holdings, Inc. Comments at 7-11. Time Warner does not find fault with the materials submitted as Exhibit D to the MCI Petition. *Id.* at 11.

[5] *Id.* at 3.

[6] *Id.*

[7] *Id.* at 7.

Predictably, the *only* party filing comments in support of the MCI Petition was AT&T Corporation.[8] Like MCI, AT&T is a "covered interexchange carrier" under Section 271(e)(1), which limits the ability of covered IXCs to jointly market local and long distance services until the BOC is authorized to provide service in the same territory.[9] Not surprisingly, then, AT&T supports MCI's call for a narrow reading of what marketing practices should be prohibited under Section 271(e)(1) . As shown below, AT&T's arguments do not withstand scrutiny and should be rejected by the Commission.

Specifically, AT&T argues that a covered IXC may advertise the availability of interLATA service and resold BOC local services in a single advertisement "as long as it does not mislead the public by stating or implying that it may offer bundled packages of long distance and resold local service or that it can provide one-stop shopping through a single transaction."[10] AT&T then concludes that the MCI marketing pieces do not carry any such misleading implications.[11] This conclusion is wholly unsupported by the record.

For example, MCI's first advertisement, submitted as Exhibit A to its petition, promises, to those current long distance customers who also sign up for resold local service, "joint customer care — 'one call to one company for customer service' and 'one easy-to-read monthly

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[8] *See* AT&T Corp. Comments at i, 1-2.

[9] *See* 47 U.S.C. § 271(e)(1).

[10] AT&T Corp. Comments at 8. The Commission stated in the *Non-Accounting Safeguards Order* that "a covered interexchange carrier may advertise the availability of interLATA services and BOC resold local services in a single advertisement, but such carrier may not mislead the public by stating or implying that it may offer bundled packages of interLATA service and BOC resold service, or that it can provide 'one-stop shopping' of both services through a single transaction." *Non-Accounting Safeguards Order* at ¶ 280.

[11] *See* AT&T Corp. Comments at 8.

statement for both your local and long distance calls.'"[12] The second advertisement included as part of Exhibit A bundles MCI's "Friends and Family" long distance service with local service. Another advertisement, included in the MCI petition as Exhibit B, promises to existing MCI long-distance customers "One company . . . one bill . . . one call."[13]

These advertisements clearly contravene the Section 271(e)(1) restriction against joint marketing by conveying the appearance of one-stop shopping for local and interLATA service to potential customers at a time when MCI is not permitted to offer one-stop shopping.[14] As BellSouth showed in its comments, when a company like MCI, or AT&T for that matter, both well-known long-distance companies, uses the expression "One company . . . one bill . . . one call" in materials promoting its local service to consumers, at the same time as it claims to regulators that it is *not* engaged in joint marketing, it is attempting to mislead both consumers and regulators.[15] Accordingly, because the appearance of one-stop shopping that MCI's marketing materials create so blatantly violates both congressional intent and the clear meaning of Section 271(e)(1), AT&T's blanket statement that these marketing pieces do not carry any misleading implications cannot be sustained.

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[12] MCI Petition at 8 (quoting Exhibit A).

[13] *See id.* at 8 & Exhibit B.

[14] Similarly, MCI's mailings attached as Exhibit C include solicitations used by MCI to promote its local service offerings to its existing long distance customers. Like the advertisements in Exhibits A and B, these mailings clearly imply one-stop shopping.

[15] *See* BellSouth Comments at 5.

AT&T also argues that the MCI marketing materials must be approved, or else serious First Amendment concerns will be raised.[16] In support of these arguments, AT&T cites the 1996 Supreme Court decision in *44 Liquormart v. Rhode Island*[17] for the proposition that "so long as IXC statements are truthful, they are accorded constitutional protection."[18] Further discussion is conspicuously absent.

44 Liquormart involved a Rhode Island law banning the advertisement of retail liquor prices, which was found to be unconstitutional because it was a *blanket* advertising prohibition that *did not protect consumers* from commercial harms.[19] Nevertheless, the Court noted that commercial advertising can be regulated more freely than other forms of protected speech due to "commonsense differences" that exist between commercial messages and other types of protected expression.[20] Accordingly, regulation of commercial speech to protect consumers from misleading, deceptive, or prohibited information justifies "less than strict review," while blanket

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16 *See* AT&T Corp. Comments at i, 4, 8-10, 12.

17 116 S. Ct. 1495, 1505 (1996).

18 AT&T Corp. Comments at 8.

19 *44 Liquormart*, 116 S. Ct. at 1501-02, 1508.

20 *Id.* at 1505-06; *see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 & n.24 (1976) (holding that the State may require commercial messages to "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive"); *Bates v. State Bar of Arizona*, 433 U.S. 350, 366 (1977) (finding that States may restrict aggressive sales practices that have the potential to exert "undue influence" over consumers).

prohibitions on the dissemination of truthful messages are subject to more "rigorous review."[21] Any restrictions should also be "no more extensive than necessary."[22]

In the case of the Section 271(e)(1), the joint marketing restriction on advertising is not a complete ban as was the case with the Rhode Island statute in *44 Liquormart*. As interpreted by the Commission, it is designed in the advertising context to prevent conveying the appearance of one-stop shopping of long distance and BOC resold local services to consumers at a time when covered IXCs like MCI and AT&T may not provide such services jointly.[23] Notably, covered IXCs *may* advertise and market jointly interLATA services and local services provided through means *other than* BOC resold local services,[24] and they may advertise bundled long distance and BOC resold local service *once* BOCs are allowed to compete in the long distance market.[25] In enacting Section 271(e)(1), Congress sought merely to promote regulatory and marketing parity by limiting the degree to which a covered IXC may use a BOC's resold local service in conjunction with its own long distance service.[26] Accordingly, because the Act's joint marketing

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21 *44 Liquormart*, 116 S. Ct. at 1507; *see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 n.9 (1980).

22 *44 Liquormart*, 116 S. Ct. at 1510.

23 *Non-Accounting Safeguards Order* at ¶¶ 280, 282.

24 *Id.* at ¶ 279 ("[W]e see no lawful basis for restricting a covered interexchange carrier's right to advertise a combined offering of local and long distance services, if it provides local service through means other than reselling BOC local exchange service.").

25 *See id.* at ¶ 277.

26 *See* S. Rep. No. 23, 104th Cong., 1st Sess. 43 (1995) ("Senate Report").

restriction on advertising is in the nature of a "time, place, or manner of expression"[27] restriction and is not a blanket ban, it is subject to the "less than strict review standard" enunciated by the Court in *44 Liquormart*.

Under this standard, the limited prohibition on advertisements that convey the appearance of one-stop shopping for long distance and BOC resold local service is a reasonable means of deterring IXCs from misleading consumers and is clearly "no more extensive than necessary" to ensure that the governmental interest underlying Section 271(e)(1) is carried out.[28] That is, Congress specifically imposed the joint marketing restriction in Section 271(e)(1) to provide parity between the BOCs and the IXCs in their ability to offer one stop shopping.[29] The restriction is limited in duration — it will sunset once a BOC is allowed to enter the long distance market in a given state and competition is allowed to take place between the BOCs and the IXCs in their ability to offer and advertise bundled services to consumers, or after three years, whichever is earlier.[30] Thus, the limited advertising restriction is a reasonable way for the

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27 *See 44 Liquormart* at 1507 (citing *Kovacs v. Cooper*, 366 U.S. 77, 89 (1949)); *Virginia State Bd. of Pharmacy*, 425 U.S. at 771; *see also* Time Warner Communications Holdings, Inc. Comments at 3 ("The joint marketing restriction is of a very limited duration and does not apply to marketing of an interexchange carrier's provision of local services over its own facilities, through the use of unbundled network elements, or through resold local services purchased from a local exchange carrier that is not a BOC.")

28 *See Non-Accounting Safeguards Order* at ¶ 277.

29 *See* Senate Report at 43.

30 *Non-Accounting Safeguards Order* at ¶ 277.

Commission to carry out the governmental interest in ensuring parity between the BOCs and the IXCs.[31]

Based on the foregoing and as discussed in more detail in BellSouth comments,[32] because the MCI marketing materials clearly convey the appearance of one-stop shopping at a time when MCI is not permitted to legally bundle long distance and resold BOC local service, its advertisements are of the nature prohibited under Section 271(e)(1). These advertisements should be restricted by the Commission until the BOC can offer long distance service in the state in question. Under these circumstances, such a restriction is fully consistent with the Supreme Court's mandate in *44 Liquormart* and fails to "raise [the] serious First Amendment concerns" cited by AT&T.

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31 *See 44 Liquormart* at 1510.

32 *See* BellSouth comments at 4-9.

CONCLUSION

For the foregoing reasons, BellSouth reiterates that the Commission should find the marketing materials submitted by MCI to be contrary to Section 271(e)(1) and the Commission's *Non-Accounting Safeguards Order*. Accordingly, MCI's Petition for Declaratory Ruling should be denied.

Respectfully submitted,

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June 24, 1997

CERTIFICATE OF SERVICE

I, Crystal Clay, do hereby certify that copies of the foregoing "BellSouth Reply Comments" regarding MCI's "Petition for Declaratory Ruling" in CC Docket No. 96-149 were served by U.S. first-class mail, postage prepaid, on this 24th day of June 1997, to the persons listed below:

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